

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN SCOTT FOSTER,

Defendant-Appellant.

UNPUBLISHED

November 10, 2005

No. 254860

Clinton Circuit Court

LC No. 03-007451-FC

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree criminal sexual conduct with a person under thirteen, MCL 750.520b(1)(a), for which the trial court sentenced defendant to serve a term of 15 to 50 years' imprisonment. We affirm. This appeal is being heard without oral argument pursuant to MCR 7.214(E).

Defendant argues that his trial counsel was ineffective because he failed to cross-examine the prosecution's witnesses in a meaningful and confrontational manner, which evidenced that he had not prepared for trial. Defendant also claims that his trial counsel was ineffective because he failed to present a competent closing argument which, again, evidenced that he was unprepared. We disagree on both grounds. Although defendant moved for a new trial or evidentiary hearing, the trial court denied the motion. Therefore, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

A defendant's fundamental right to counsel has long been recognized as the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). To prove ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was deficient to the extent that it fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's deficient performance so prejudiced the defendant that it deprived him of a fair trial, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In proving these elements, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Riley, supra* at 140.

We first address defendant's claim that his trial counsel was ineffective because he failed to cross-examine the prosecution's witnesses in a meaningful and confrontational manner. Specifically, defendant points to the fact that trial counsel asked minimal questions of the complainant, and asked no questions of the complainant's grandmother or the Family Independence Agency worker assigned to the case. "Decisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy." *People v Bass (On Rehearing)*, 223 Mich App 241, 252; 565 NW2d 897, vacated in part on other grounds 457 Mich 866 (1997). Thus, "[i]n order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant." *Id.* at 252-253.

Defendant has failed to support his assertion that defense counsel failed to adequately cross-examine the witnesses. In cross-examining the complainant, trial counsel attempted to bring up the fact that she had made previous allegations of sexual abuse against her mother's former husband, but complainant claimed that she did not remember that occurring. Also, trial counsel similarly questioned the physician who examined the complainant about the prior allegations involving the complainant, confirming that there was a claim that the girl had been molested in 1998. Therefore, defendant has failed to show that he was denied a substantial defense or presentation of valuable evidence. Further, trial counsel's questioning demonstrates that part of his strategy was to suggest that the girl may be fabricating the story to get attention, and during closing argument, counsel elucidated that this was part of his strategy. Trial counsel also explained in his closing argument his failure to cross-examine the other witnesses as follows:

We are – what we have done, I hope, is to get across to you stuff that is important in a manner that is helpful to you. We haven't brought in a lot of stuff that doesn't matter. A couple of witnesses, I didn't even cross examine. Why? Because it isn't going to help you to ask more questions, so that's what is really going on here.

"[C]ounsel's words and actions before and at trial are the most accurate evidence of what his strategies and theories were at trial." *People v Grant*, 470 Mich 477, 487; 684 NW2d 686 (2004). Trial counsel's cross-examination strategy is clear, and defendant was not denied effective assistance of counsel on this ground. This Court will not second-guess defense counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, we will not assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

We next address defendant's claim that his trial counsel was ineffective because he failed to present a competent closing argument. In support of this argument, defendant asserts in his brief on appeal that his trial "counsel . . . skirted an actual endorsement of the prosecution's case." To the extent that defendant is claiming that trial counsel conceded defendant's guilt during closing argument, we find this argument to be without merit. Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Kryzstopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Nothing in trial counsel's preface to discussing the testimony of the prosecution's witnesses came close to suggesting that defendant was in fact guilty.

Further, it is true that trial counsel was jumping around in his presentation, but that does not negate that trial counsel raised significant points in support of his defense strategy. As mentioned, during closing argument he raised certain points in keeping with his strategy of suggesting that the complainant may be fabricating the story to get attention, especially in light of the 1998 allegation. Moreover, trial counsel reminded the jury that the physical examination of the complainant was inconclusive.

The other part of trial counsel's strategy that he addressed during closing was the fact that defendant's account was essentially corroborated by his friend. With respect to the inconsistencies in the friend's testimony, trial counsel noted that the incident occurred six months prior to trial and suggested that people do not necessarily make it a point to remember details like what time a guest arrived on a certain day. Trial counsel also noted that if the two men had gotten together to fabricate an alibi, then they probably would have made it a point to get their timelines straight. He stressed that they agreed about the "important things." Therefore, in light of trial counsel's efforts to highlight favorable testimony and refute unfavorable testimony, defendant has failed to support his assertion that defense counsel failed to present a competent closing argument.

To the extent that defendant argues that his trial counsel was ineffective for failing to properly prepare or investigate, we acknowledge that it can be a complete abdication of duty where counsel fails to conduct a complete investigation and substantiate a primary defense. See *Grant, supra* at 498. However, there is no indication that trial counsel failed to conduct a complete investigation in this case. To the contrary, trial counsel's two-fold trial strategy (present defendant's alibi witness and call into question the credibility of the complainant) suggests that counsel did investigate and prepare for trial.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray